SUPREME COURT OF APPEALS OF VIRGINIA.

MILLER *et al. v.* TOWN OF PULASKI.

Sept. 9, 1912.

[75 S. E. 767.]

1. **Eminent Domain** (§ 9*)—**Right to Exercise Power—Statutory Provisions.**—Code 1904, § 1038, as amended by Acts 1908, c. 349, authorizing any city or town to acquire, maintain, and operate waterworks and other public utilities, and to acquire by condemnation or otherwise land necessary for the operation of such works, empowers a town to condemn land and water rights connected therewith.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27-34; Dec. Dig. § 9.*]

2. **Eminent Domain** (§ 56*)—**Acquisition of Property—"Necessity."**—The word "necessity" in Code 1904, § 1038, as amended by Acts 1908, c. 349, authorizing any city or town to acquire land necessary for the acquisition and operation of waterworks and other public utilities, but no property shall be condemned, unless the necessity therefor shall be shown to exist, does not mean absolutely necessary, but reasonably necessary for the greatest benefit to the public with the least inconvenience and expense.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 5, pp. 4726-4737.]

3. **Eminent Domain** (§ 58*)—**Exercise of Power—Extent of Power.**—Though the water power condemned by a town will furnish more power than it needs at the present time, or will need for years to come, but all the property must be condemned in case of any taking, the condemnation is valid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

4. **Eminent Domain** (§ 238*)—**Compensation—Inadequacy—Review.**—Damages awarded on conflicting evidence by commissioners in proceedings to condemn land will not be disturbed as inadequate where the inadequacy, if any, does not show prejudice or corruption.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619; Dec. Dig. § 238.*]

Error to Circuit Court, Carroll County.

Proceeding by the Town of Pulaski to condemn for its purposes land and water rights connected therewith. There was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

judgment of condemnation, and one Miller, trustee, and others bring error. Affirmed.

M. M. Caldwell, for plaintiffs in error.
John S. Draper and *Robert S. Scott,* for defendant in error.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court for Carroll county, rendered in a proceeding instituted by the town of Pulaski to condemn for its purposes as a municipal corporation a parcel of land and water rights connected therewith, situated in Carroll county and owned by the plaintiffs in error.

[1] The first, second, and third assignments of error are as to the right or power of the town to condemn the defendants' property. It is insisted that it did not possess that right at common law, under its charter, or under any general statute. It is not claimed by the town that it had the right, either at common law or under its charter (see Miller, Trustee, etc., *v.* Town of Pulaski, 109 Va. 137, 63 S. E. 880, 22 L. R. A. [N. S.] 552), but that it did have such power under section 1038 of the Code as amended by an act approved March 14, 1908 (Acts 1908, c. 349, p. 623).

By that section as amended, which applies to towns generally, it is provided, among other things, that, in addition to the powers conferred by general statutes, the council of any city and town shall have power to acquire or establish, maintain, and operate waterworks, gasworks, electric plants, and other public utilities within or without the limits of the city or town; "to acquire within or without the limits of the city or town, by purchase, condemnation, or otherwise, whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending, or enlarging, said waterworks, gasworks, electric plants and other public utilities, and the rights of way, rails, pipes, poles, conduits, or wires, connected therewith, or any of the fixtures or appurtenances thereof; provided that no city or town shall have the right to acquire by condemnation the steam and electric plants, gas and waterworks. or water power, and the fixtures and appurtenances or any part thereof, owned and operated in whole or in part on the eighteenth day of February, nineteen hundred and eight, by any manufacturing corporation or public service corporation for the purpose of acquiring, establishing, maintaining, operating or enlarging its electric plant or waterworks; * * * provided that no property shall be condemned for the purposes specified in this section unless the necessity therefor shall be shown to exist to the satisfaction of the court having jurisdiction of the case."

It is clear, we think, that under the provisions of section 1038 of the Code, as amended, the town had the right, if the necessity for it existed, to condemn the land and water rights described in the record. The fact that "water power" is not in terms named in the "affirmative clause" of the statute, but only in the "proviso," does not show that the Legislature did not intend to give a city or town the right to condemn a water power—a right or interest annexed to land and parcel thereof. The right or power to condemn the whole, if owned by one person, would seem necessarily to give the right or power to condemn the parts that made up the whole, if owned by different persons, if necessary for the purposes of the municipality and done in the manner prescribed by statute.

[2] The next error assigned is that, even if section 1038, as amended, did give such right, no necessity for its exercise existed in this case.

That section provides that no property shall be condemned for the purposes specified in the section, unless the necessity therefor be shown to exist to the satisfaction of the court having jurisdiction of the case. The trial court, after investigation, held that the necessity for the condemnation of the said water power did exist. The plaintiffs in error, as we understand them, insist that the "necessity" for the taking contemplated by the statute does not mean that the property sought to be condemned must be reasonably necessary only, but must be absolutely or indispensably necessary for the uses and purposes for which it is to be taken.

The term "necessary," says Lewis on Eminent Domain (3d Ed.) p. 1058, "when applied to a public road, is used in the statutes and judicial decisions, not in the sense of being absolutely indispensable to communications between two points, but with relation to the purposes for which public highways are established, namely, the reasonable accommodation of the traveling public. This same observation would doubtless apply to any public improvement or work."

Again, on page 1062, he says: "When the law says that private property may be taken for public uses only when it is necessary for such use, it means a reasonable, not an absolute, necessity."

In 15 Cyc. p. 636, in discussing this question, it is said: "Nevertheless, necessity, within the meaning of this rule does not mean an absolute, but only a reasonable, necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit, although it does not include the taking of land which may merely render the improve-

ment more convenient or less expensive, or for a necessity which is merely colorable."

These text-writers seem to be sustained in their statement of what is meant by the terms "necessity" or "necessary," as used in the eminent domain statutes, by the great weight of authority and the better reason. See cases cited in notes; also cases cited in note to Wheeling, etc., Co. *v.* Toledo, etc., 2 Am. Cas. 941, 946-948.

Applying this test, the evidence in this case sustains the conclusion reached by the court, even if the discretion vested in the trial court to determine that question could be controlled by this court (as to which we express no opinion), except in a case where there had been a clear abuse of the discretion vested in the court.

[3] It is also assigned as error that the water power condemned was much greater than was necessary for the purposes of the town.

Conceding that the property condemned will furnish more power than the town needs now, or will need for years to come, it does not appear that less than the whole could have been condemned; and the evidence tends to show that if there was any taking at all the whole property must be condemned.

[4] The remaining assignment of error to be considered is that the trial court "held, contrary to the preponderance of evidence, that $475 was a fair compensation" for the property taken.

Conceding that the evidence taken by the commissioners was before the court when it passed upon the exceptions to their report (though this is denied by the defendant in error), this court could not disturb the finding of the commissioners. That evidence is conflicting, and there is nothing to show that the damages allowed, if inadequate at all, are so inadequate as to show prejudice or corruption, and without this the settled rule of this court, and of courts generally, is not to disturb the finding of the commissioners. See Barnes *v.* Tidewater Ry. Co., 107 Va. 263, 266, 267, 58 S. E. 594, and cases cited.

Upon the case presented by the record, we are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.